

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LARRY L. RILEY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,354
<b>WILLIAMS NATURAL GAS, INC.</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appeals from a Review and Modification Award entered by Administrative Law Judge Jon L. Frobish on May 24, 2002. The Appeals Board (Board) heard oral argument on November 15, 2002.

**APPEARANCES**

Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent appeared by its attorney, Douglas C. Hobbs of Wichita, Kansas.

**RECORD**

The Board considered the record listed in the Review and Modification Award.

**ISSUES**

In its Application for Appeal respondent listed the issues for review as:

1. “Whether or not the Claimant is entitled to a modification of his original Award.

(2) And if so, extent of such review and modification.”

In its brief to the Board, however, respondent does not dispute that claimant’s condition has worsened or that his impairment has increased. Rather, respondent contends the modification of the original Award should be less than the 29 percent permanent partial general disability awarded by the ALJ. Specifically, respondent contends that claimant’s impairment is now 14 percent to the body as a whole. Conversely, claimant contends his percentage of functional impairment is greater than that awarded by the ALJ.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant was injured in a November 18, 1997 work-related accident. Subsequently, claimant and respondent entered into an Agreed Award that was approved by Administrative Law Judge John D. Clark on March 1, 1999. Pursuant to the agreement and request of the parties, Judge Clark entered an Award for 7.71 weeks of temporary total disability compensation at the rate of \$351 per week or \$2,707.70, followed by 52.94 weeks of permanent partial disability compensation to be paid at the rate of \$351 per week, or \$18,580.95, for a total award of \$21,288.65. The Agreed Award did not provide a percentage of permanent partial disability or functional impairment, nor did it specify the areas of injury and impairment.

On August 13, 2001, claimant filed for a Review and Modification of the Agreed Award based on a worsening of claimant’s condition and increased impairment. Claimant received additional medical treatment and an additional 32 weeks of temporary total disability compensation.

The parties agree that the original Agreed Award providing for \$18,580.95 in permanent partial disability compensation approximated a 12.75 percent functional impairment to the body as a whole. In his brief to the Board, claimant contends that “The original Award considered three (3) body parts; low back, left shoulder and left knee. The parties entered into a running award for \$18,580.95. A particular impairment of function rating was not specified. However, working backwards, an Award of \$18,580.95 represents a 12.75 percent whole body impairment.”<sup>1</sup>

Respondent agrees that:

The case was settled for \$18,580.95 on a 12.75% impairment to the body as a whole. There was evidence in the case claimant had injured his low back,

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<sup>1</sup> Claimant’s Brief at 1.

left knee, and left shoulder, however, the parties did not stipulate in the settlement how much impairment was assigned to each individual body part.<sup>2</sup> Claimant further contends that:

. . . neither the low back nor the left knee impairment has changed since the original Award of March 1, 1999. However, the impairment to the left shoulder has increased. In addition, there is now impairment to the right shoulder. As such, claimant respectfully requests that the review and modification be granted and that a new Award be entered reflecting the increased impairment to both shoulders.<sup>3</sup>

Claimant argues that his impairment of function has increased by 23 percent for an overall impairment of 35.75 percent.

The review and modification statute K.S.A. 44-528 permits a modification of an award where there has been an increase of the claimant's functional impairment. For review and modification to be warranted, claimant has the burden to show a change of circumstances.<sup>4</sup> In order for claimant to meet his burden that there has been a change of circumstance, in this case, a worsening of his condition, there must be evidence of what claimant's condition was at the time of the agreed award. Unfortunately, that evidence does not exist. Claimant's burden in this regard is not satisfied by showing what one particular physician considered claimant's impairment to be then and now, nor is it satisfied by the parties agreeing to a total percentage of impairment. What is missing is a breakdown of what the 12.75 percent permanent partial disability represented as to each area of the body for which permanent impairment was alleged. The parties acknowledge that the agreed permanent partial disability award took into consideration the functional impairment ratings of several physicians including Drs. Yost, Prostic and Nye. Absent a showing or an agreement as to what the agreed award represented with respect to claimant's permanent impairment of function, an increase in that percentage cannot be determined. Accordingly, claimant has failed to meet his burden of proof under K.S.A. 44-528.

Nevertheless, respondent has admitted that, pursuant to the testimony of Dr. Philip Mills, claimant now has a 14 percent permanent partial impairment to the body as a whole and that "The Board should adopt and follow the opinion of Dr. Mills in assessing

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<sup>2</sup> Respondent's Brief at 3.

<sup>3</sup> Claimant's Brief at 1-2.

<sup>4</sup> See, e.g., *Gile v. Associated Co. Inc.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffey v. Fleming Co.*, 199 Kan. 453, 430 P.2d 259 (1967); *Redgate v. City of Wichita*, 17 Kan. App. 2d 253, 836 P. 2d 1205 (1992).

claimant's functional impairment.”<sup>5</sup> “Respondent respectfully requests the Board enter a modified award based upon a 1.25% increase in functional impairment to the body as a whole.”<sup>6</sup> Accordingly, the Agreed Award will be modified to award the additional weeks of temporary total disability compensation and permanent partial disability compensation based upon a 14 percent impairment of function which is an increase of 1.25 percent above the 12.75 percent impairment of function previously awarded.

### **Award**

**WHEREFORE**, the Board modifies the May 24, 2002 Review and Modification Award entered by Administrative Law Judge Jon L. Frobish and decreases the permanent partial general disability from 29 percent to 14 percent as follows:

Larry L. Riley is granted compensation from Williams Natural Gas, Inc., for a November 18, 1997 accident and resulting disability. Based upon an average weekly wage of \$832.00, Mr. Riley is entitled to receive the following disability benefits:

Claimant is entitled to receive 7.71 weeks of temporary total disability benefits at \$351 per week, or \$2,707.70, plus 52.94 weeks of permanent partial general disability benefits are due at \$351 per week, or \$18,580.95 for a 12.75 percent permanent partial general disability.

For the period commencing February 13, 2001, claimant is entitled to 32 weeks of temporary total disability benefits at \$351 per week or \$11,232.00 followed by 4.88 weeks of permanent partial disability benefits at \$351 per week for \$1,712.88, for an additional 1.25 percent permanent partial general disability and a total award of \$34,233.53 all of which is past due and owing in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

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<sup>5</sup> Respondent's Brief at 2.

<sup>6</sup> Respondent's Brief at 14.

Dated this \_\_\_\_\_ November 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation